

The opinion in support of the decision being entered today was *not* written for publication in a law journal and is *not* binding precedent of the Board.

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte STEVEN E. SADINSKY

Appeal 2007-0522
Application 10/723,817
Technology Center 3600

Decided: March 14, 2007

Before ANITA PELLMAN GROSS, JENNIFER D. BAHR, and ANTON W. FETTING, *Administrative Patent Judges*.

GROSS, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

Sadinsky (Appellant) appeals under 35 U.S.C. § 134 from the Examiner's final rejection of claims 1 through 20, 24, and 25, which are all of the claims pending in this application.

Appellant's invention relates to a gate pole for a swimming pool fence and the fence including the pole. Claims 1 and 18 are illustrative of the claimed invention, and they read as follows:

1. A lightweight fence and gate for swimming pools surrounded by a deck comprising a plurality of poles, the poles including an insert that is contained within each pole and a pin that is fixedly attached to each insert, the pin protruding from the bottom of each pole;

a mesh screen tensioned between the poles having top and bottom bindings;

a gate in the fence including a frame having a pair of spaced upright support members, a first horizontal brace for spacing the upright support members and a length of mesh screen tensioned between the upright support members;

support means capable of withstanding lateral tension forces of the screen for supporting and latching the gate;

hinges secured to the support means on one side of the gate; and

a latch device secured to the gate and to the support means on the opposite side of the gate;

wherein the pins are adapted to be inserted into the pool deck adjacent to the pool; and

wherein the pool deck has a plurality of sockets, each socket adapted to receive one pin.

18. A gate pole comprising:

a lower end;

an insert that is received within the lower end of the fence pole; and

a pin that is fixedly attached to the insert, the pin having a diameter smaller than that on the pole and a portion that protrudes from the lower end of the fence pole;

wherein the pin is adapted to be inserted into a drilled socket in a pool deck.

The prior art references of record relied upon by the Examiner in rejecting the appealed claims are:

Rasso	US 2,384,338	Sep. 04, 1945
O'Fearn	US 4,576,364	Mar. 18, 1986
Sadinsky	US 5,664,769	Sep. 09, 1997

Claims 18, 20, and 25 stand rejected under 35 U.S.C. § 102(b) as being anticipated by Rasso.

Claims 18, 19, and 25 stand rejected under 35 U.S.C. § 102(b) as being anticipated by O'Fearn.

Claim 20 stands rejected under 35 U.S.C. § 103 as being unpatentable over O'Fearn.

Claims 1 through 17 and 24¹ stand rejected under 35 U.S.C. § 103 as being unpatentable over Sadinsky in view of O'Fearn.

We refer to the Examiner's Answer (mailed August 29, 2006) and to Appellant's Brief (filed October 27, 2005) and Reply Brief (filed October 16, 2006) for the respective arguments:

¹ Although the Examiner omits claim 24 in the statement of the rejection (Answer 5), the Examiner discusses claim 24 in the body of the rejection. Further, Appellant (Br. 10) argues claim 24 as if rejected. Accordingly, we will treat claim 24 as rejected.

SUMMARY OF DECISION

As a consequence of our review, we will reverse the anticipation rejection of claims 18, 20, and 25 over Rasso, affirm the anticipation rejection of claims 18, 19, and 25 over O'Fearn, affirm the obviousness rejection of claim 20 over O'Fearn, and reverse the obviousness rejection of claims 1 through 17 and 24 over Sadinsky in view of O'Fearn. In addition, we enter new grounds of rejection of claims 18 through 20 under 35 U.S.C. § 102(a) over the admitted prior art on pages 1-2 of the Specification (APA), of claim 25 under 35 U.S.C. § 103 over APA, and of claims 1 through 17 and 24 under 35 U.S.C. § 103 over Sadinsky in view of APA.

OPINION

Appellant first contends (Br. 4) that the chiseled point at the end of Rasso's pole fails to satisfy the claim limitation of a pin "adapted to be inserted into a drilled socket in a pool deck." Specifically, Appellant contends (Br. 4) that the chiseled point would not fit properly in a circular socket and (Br. 5) that the widening at the point of the pole "would leave a large gap between the walls of the socket and the vast majority of the pole" making the pole unstable, and, thus, unsafe. Consequently, the chiseled point is not adapted to be inserted into a pool deck drilled socket. We agree. Thus, since Rasso fails to satisfy each and every limitation of claim 18 and the claims which depend therefrom, Rasso cannot anticipate claims 18, 20, and 25.

Appellant next contends (Br. 6) that O'Fearn's stake telescoped within a hollow pole is neither a pin nor adapted to be inserted into a drilled socket in a pool deck. In particular, Appellant contends (Br. 6) that the

diameter of the stake is only slightly smaller than the diameter of the pole and that the bottom of the stake is angled to form a spike for being pushed into sand or soil. (See also Reply Br. 5.) Further, Appellant contends (Br. 6-7 and Reply Br. 5) that the design of O'Fearn's stake is contrary to the claimed pins that are adapted to be inserted into a drilled socket in a pool deck as resting on a sharp point at the tip would make the pole unstable. Last, Appellant contends (Br. 7 and Reply Br. 6) that O'Fearn does not satisfy claim 18 since there is no description of a gate pole. We disagree.

We find no specific definition of "pin," and, therefore, we disagree with Appellant that the stake of O'Fearn cannot be considered a pin. Further, if the stake were set in a deep enough socket, the stake would be held by the walls of the socket, and the angled tip would not significantly reduce the stability of the pole. As to the diameter of the pin, the claim requires "a diameter smaller than that on the pole," not a particular diameter. Thus, as Appellant admits (Br. 6) that the stake in O'Fearn is smaller in diameter than that of the pole so as to telescope within the pole, the stake satisfies the diameter limitation for the pin. Regarding the lack of disclosure of a gate pole, as O'Fearn's pole satisfies all of the structural limitations of claim 18, and since the preamble (a gate pole) adds no further structure to the claim (i.e., is not "'necessary to give life, meaning, and vitality' to the claim." *See, e.g., Poly-America, L.P. v. GSE Lining Tech., Inc.*, 383 F.3d 1303, 1309-10, 72 USPQ2d 1685, 1689 (Fed. Cir. 2004)), O'Fearn anticipates claim 18. Therefore, we will sustain the anticipation rejection of claims 18, 19, and 25 over O'Fearn.

Regarding the obviousness rejection of claim 20 over O'Fearn, Appellant presents the same argument as for claims 18, 19, and 25. As we

have found the above-noted arguments unpersuasive, we will sustain the obviousness rejection of claim 20.

For the obviousness rejection of claims 1 through 17 and 24 over Sadinsky in view of O'Fearn, Appellant contends (Br. 10-11 and Reply Br. 6-8) that the references provide no motivation to combine. We agree. The purpose of O'Fearn's design of a stake telescoped inside a hollow pole is to be able to raise the screen by telescoping the poles. Raising the fence in Sadinsky would allow children to get under the fence, thereby defeating the purpose of keeping unsupervised children out of the pool area. Accordingly, it would not have been obvious to modify Sadinsky with the pole structure of O'Fearn, and we cannot sustain the obviousness rejection of claims 1 through 17 and 24.

Under the provisions of 37 C.F.R. § 41.50(b), we enter the following new grounds of rejection against Appellant's claims 1 through 20, 24 and 25. Claims 18 through 20 are rejected under 35 U.S.C. § 102(a) as being anticipated by APA. Appellant discloses (Specification 1:28-35) poles were developed with smaller diameter steel pins mounted at the lower end of the poles such that the pins could be placed in holes in a pool deck that were smaller than the holes needed for previous poles. Appellant further discloses (Specification 2:1-7) that a pin was mounted by inserting it in one end of a plastic pipe which was in turn inserted into the end of the pole, and a screw held the three pieces together. Thus, claims 18 through 20 are anticipated by the admitted prior art at pages 1-2 of the Specification.

Claim 25 is rejected under 35 U.S.C. § 103 over APA. The only difference between APA and claim 25 is the method of attaching the pin to the plastic insert. Specifically, Appellant discloses attaching the pin, the

insert, and the pole with a screw, whereas claim 25 recites attaching the pin to the insert with an adhesive. As adhesive and screws are well recognized equivalent ways of fastening, it would have been obvious to substitute adhesive for the screws of the admitted prior art. Therefore, claim 25 would have been obvious over APA.

Claims 1 through 17 and 24 are rejected under 35 U.S.C. § 103 over Sadinsky in view of APA. Sadinsky recites (claims 6, 10, and 15) all of the limitations of claims 1 through 5, 7, and 8, 10 through 12, and 14 through 16, respectively, except for the structure of the poles including a plastic insert within each pole and a metal pin attached to each insert and protruding from the insert. Appellant discloses (Specification 1:28-35) that poles were developed with smaller diameter steel pins mounted at the lower end of the poles such that the pins could be placed in holes in a pool deck that were smaller than the holes needed for previous poles. Appellant further discloses (Specification 2:1-7) that a pin was mounted by inserting it in one end of a plastic pipe which was in turn inserted in the end of the pole, and a screw held the three pieces together. It would have been obvious to replace the poles of Sadinsky with the poles of the admitted prior art to be able to use smaller holes in the pool deck.

We note that Appellant states (Specification 1:33-35) that the poles with protruding pins were not previously used for gates because of a need for a more stable rigid structure near the gate. However, since Sadinsky already makes the structure near the gate more rigid and stable by using multiple poles with cross structures adjacent each side of the gate to relieve the tension in the fence (col. 2, ll. 3-4), the need for more stable individual poles is reduced. Therefore, it would have been obvious to use the admitted

prior art poles to be able to use the smaller holes in the deck. As to claims 9, 13, 17, and 24, adhesive and screws are well recognized equivalent ways of fastening. Therefore, it would have been obvious to substitute adhesive for the screws of the admitted prior art poles when used in Sadinsky's fence. Accordingly, claims 9, 13, 17, and 24 would have been obvious over Sadinsky in view of APA.

Regarding claim 6, Appellant does not specify what type of plastic was used as the insert for the swimming pool fence poles. However, since PVC or polyvinylchloride is known to be a sturdy, weather resistant type of plastic, it would have been obvious to the skilled artisan to select PVC as the plastic for the pole inserts. Accordingly, claim 6 would have been obvious over Sadinsky in view of APA.

ORDER

The decision of the Examiner rejecting claims 18, 20, and 25 under 35 U.S.C. § 102(b) over Rasso is reversed. The decision of the Examiner rejecting claims 18, 19, and 25 under 35 U.S.C. § 102(b) over O'Fearn is affirmed. The decision of the Examiner rejecting claim 20 under 35 U.S.C. § 103 over O'Fearn is affirmed. The decision of the Examiner rejecting claims 1 through 17 and 24 under 35 U.S.C. § 103 over Sadinsky in view of O'Fearn is reversed. Therefore, the Examiner's decision is affirmed-in-part. In addition we have entered a new ground of rejection against claims 18 through 20 under 35 U.S.C. § 102(a) over APA, against claim 25 under 35 U.S.C. § 103 over APA, and against claims 1 through 17 and 24 under 35 U.S.C. § 103 over Sadinsky in view of APA.

Regarding the affirmed rejection(s), 37 C.F.R. § 41.52(a)(1) provides "Appellant may file a single request for rehearing within two months from the date of the original decision of the Board."

In addition to affirming the Examiner's rejection(s) of one or more claims, this decision contains new grounds of rejection pursuant to 37 C.F.R. § 41.50(b) (effective September 13, 2004, 69 Fed. Reg. 49960 (August 12, 2004), 1286 Off. Gaz. Pat. Office 21 (September 7, 2004)). 37 C.F.R. § 41.50(b) provides "[a] new ground of rejection pursuant to this paragraph shall not be considered final for judicial review."

37 C.F.R. § 41.50(b) also provides that Appellant, WITHIN TWO MONTHS FROM THE DATE OF THE DECISION, must exercise one of the following two options with respect to the new grounds of rejection to avoid termination of the appeal as to the rejected claims:

(1) *Reopen prosecution.* Submit an appropriate amendment of the claims so rejected or new evidence relating to the claims so rejected, or both, and have the matter reconsidered by the Examiner, in which event the proceeding will be remanded to the Examiner. . . .

(2) *Request rehearing.* Request that the proceeding be reheard under § 41.52 by the Board upon the same record. . . .

Should Appellant elect to prosecute further before the Examiner pursuant to 37 C.F.R. § 41.50(b)(1), in order to preserve the right to seek review under 35 U.S.C. §§ 141 or 145 with respect to the affirmed rejection, the effective date of the affirmance is deferred until conclusion of the prosecution before the Examiner unless, as a mere incident to the limited prosecution, the affirmed rejection is overcome.

If Appellant elects prosecution before the Examiner and this does not result in allowance of the application, abandonment or a second appeal, this case should be returned to the Board of Patent Appeals and Interferences for final action on the affirmed rejection, including any timely request for rehearing thereof.

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No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a). *See* 37 CFR § 1.136(a)(1)(iv) (2006).

AFFIRMED-IN-PART
37 C.F.R. § 41.50(b)

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